

2005 DRAFTING REQUEST

Bill

Received: **03/30/2005**

Received By: **pgrant**

Wanted: **As time permits**

Identical to LRB:

For: **Scott Suder (608) 267-0280**

By/Representing: **Anne Emerson**

This file may be shown to any legislator: **NO**

Drafter: **pgrant**

May Contact:

Addl. Drafters:

Subject: **Eminent Domain - miscellaneous**

Extra Copies:

Submit via email: **YES**

Requester's email: **Rep.Suder@legis.state.wi.us**

Carbon copy (CC:) to:

Pre Topic:

No specific pre topic given

Topic:

Use of income in determining fair market value

Instructions:

See Attached

Drafting History:

| <u>Vers.</u> | <u>Drafted</u> | <u>Reviewed</u> | <u>Typed</u> | <u>Proofed</u> | <u>Submitted</u> | <u>Jacketed</u> | <u>Required</u> |
|--------------|----------------------|------------------------|------------------------|----------------|--|-----------------------|-----------------|
| /? | pgrant 04/05/2005 | wjackson 04/28/2005 | | _____ | | | S&L |
| /1 | | | pgreensl 04/28/2005 | _____ | lnorthro 04/28/2005 lemery 09/09/2005 | mbarman 09/09/2005 | |

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|--------------|----------------|-----------------|--------------|----------------|------------------|-----------------|-----------------|
| /? | pgrant | 1 Wlj 4/28 | PS | PS | PS | | |

FE Sent For:

<END>

Basford, Sarah

From: Emerson, Anne
Sent: Tuesday, March 29, 2005 6:01 PM
To: LRB.Legal
Cc: Suder, Scott; Hilgemann, Luke
Subject: Bill Draft Requests

1-0280

PG

★ Representative Suder would like to draft legislation relating to condemnation proceedings. Please find attached a memo that provides additional information regarding what we are looking to do. If you have any questions, please do not hesitate to contact us.

Also, we are looking to draft legislation relating to harassment restraining orders. I have additional written information regarding what we are looking to do, if you could just let me know who I should send it to, I'd be happy to inter-d it over. The sections of the statutes we are looking at is Chap. 813.12 (3) (c), 813.125 (3)(c) & (4)(c), 814.61(1)(c) and 814.70(1).

Thank you!
Anne Emerson
Office of State Representative Scott Suder

03/30/2005

GARVEY ANDERSON
BUSINESS & TRIAL LAWYERS

November 4, 2004

GARVEY,
ANDERSON,
JOHNSON,
GERACI &
MIRR, S.C.

JAMES E. GARVEY (Retired)
DAVID G. ANDERSON
DOUGLAS M. JOHNSON
SEBASTIAN J. GERACI
JOSEPH R. MIRR
CAROL S. DITTMAR
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TERESA E. O'HALLORAN*
WILLIAM S. MILNE
MATTHEW J. CORNETTA*
JEFFREY J. SERUM**
DEREK L. PRESTIN**

* Also licensed to practice in Minnesota
** Also licensed to practice in Illinois

GRAHAM RIVERSIDE BUILDING
402 GRAHAM AVENUE

PLEASE REPLY TO:
P.O. Box 187
Eau Claire, WI 54702-0187
715-834-3425
715-834-2635 FAX

FEIN: 39-1249619

John A. Kisiel
Director of the Development Council
Wisconsin Builders Association
4868 High Crossing Boulevard
Madison, WI 53704-7403

RE: Neil Haselwander

Dear John:

I am enclosing for your information a copy of Memorandum from one of the associate lawyers in our firm to me regarding the ability to enact legislation retroactively in Wisconsin which would change the rules governing determinations of just compensation in condemnation proceedings. I thought this would be helpful to you.

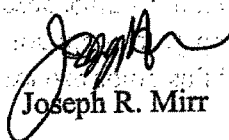
Neil Haselwander has asked that I propose some suggested language to you to amend the Wisconsin Statutes to allow for the use of the income approach in valuing property interests in condemnation proceedings. It would be my suggestion that the provision would be inserted in Section 32.09 of the Wisconsin Statutes, either as an amendment to subsection 1m or as a new subsection. I think that the proposed language would be along the lines of the following:

"As a basis for determining value, a commission in condemnation or a court may consider an appraisal based upon the income approach."

Obviously, the Wisconsin Legislative Reference Bureau or some other resource may be much more helpful in framing the appropriate language, but hopefully the above will be a good start.

Please keep me posted as to your efforts regarding this matter.

Sincerely,


Joseph R. Mirr

JRM:sa

Enclosure

cc: Mr. Neil Haselwander (w/Enc.)
Mr. Craig Solum (w/Enc.)

MEMORANDUM

TO: Joe Mirr
FROM: Derek Prestin
RE: Haselwander Bros., Inc. - Real Estate Condemnation
DATE: October 8, 2004

You asked me to research whether potential legislation, which would require the value of a property calculated using the "income approach" to be considered in a condemnation proceeding, could apply retroactively to this case. The quick answer is that it is probable that such potential legislation could be given retroactive effect and pass constitutional muster.

It appears that the legislature is free to pass a statute which has a retroactive effect, provided that the statute, as applied retroactively, does not run afoul of the constitution (U.S. or state). Retroactive legislation, like prospective legislation, enjoys a presumption of constitutionality, and the challenger bears the burden of overcoming that presumption. See *Martin v. Richards*, 192 Wis.2d 156, 200 (1995), citing *Chappy v. LIRC*, 136 Wis. 2d 172, 192 (1987). Whether or not a statute may be applied retroactively and pass constitutional muster is determined by looking at whether the statute is remedial or procedural in nature or if the statute affects substantive rights.

Statutes that are remedial or procedural are generally given retroactive application. See *Nieman v. American Nat'l Prop. & Cas. Co.*, 236 Wis.2d 411, 420 (2000), citing *Gutter v. Seamandel*, 103 Wis.2d 1, 17 (1981). That is, where the statute at issue is remedial or procedural, it will be applied retroactively unless there is a clearly expressed legislative intent to the contrary or unless retroactive application will interfere with contracts or vested rights. See *Lins. v. Blau*, 220 Wis.2d 855, 862 (Wis.Ct.App. 1998), citing *City of Madison v. Town of Madison*, 127 Wis.2d 96, 102 (Wis.Ct.App. 1985). If the statute prescribes a method for enforcing a right or remedy, it is deemed to be procedural. See *Lins*, 220 Wis.2d at 862, citing *City of Madison*, 127 Wis.2d at 102.

Here, there seems to be a fairly strong argument that the new legislation would be procedural in nature. Here, the potential legislation that would require the value determined using the "income approach" to be considered should be considered to be procedural in nature, as it does not impact any substantive rights, but rather would affect the method which is used to determine the proper compensation for the government's interfere with a private property right. That is, it would prescribe the method that must be used in determining "just compensation" for a government taking. The substantive right here, the right to receive just compensation for private property which is taken by the government for public use, is not effected by the new legislation. The right existed before the passage of the potential legislation and will exist in an unchanged form after the passage of the legislation. The only affect of the potential legislation is that now, in

addition to (or in place of) the "cost approach" and "comparable sales approach," the value placed on a property taken by the government calculated using the "income approach" must be considered. Therefore, the potential legislation effects the method for enforcing a right, how the value of the property is calculated, and is properly considered a procedural statute. Additionally, the potential legislation does not interfere with any contractual or vested rights. As a result, the potential legislation may be applied retroactively without running into constitutional problems.

While there is a strong argument that the potential legislation is procedural (thus stopping the analysis there), it is instructive to set forth the process that the Court would use should the Court disagree and hold that the potential legislation is not procedural in nature. A rational basis test is applied when the court reviews the constitutionality of retroactive economic legislation where such legislation affects substantive rights. See *Nieman*, 236 Wis.2d at 419, citing *Pension Benefit Guar. Corp. v. R.A. Gray & Co.*, 467 U.S. 717, 730 (1984). If the statute creates, defines, or regulates rights or obligations, it is deemed to be substantive. See *Lins*, 220 Wis.2d at 862, citing *City of Madison*, 127 Wis.2d at 102. The Wisconsin Supreme Court has held that to determine whether a retroactive statute is supported by a rational basis, the public interest served by the statute is weighed against the private interest that it overturns, including any unfairness caused by the retroactivity. See *Nieman*, 236 Wis.2d at 419, citing *Martin*, 192 Wis.2d at 201. In applying the rational basis test, the court must balance the public interest served by the retroactive application of the statute against the private interests that are overturned by it, including an unfairness inherent in such application. See *Martin*, 192 Wis.2d at 211.

In most of the cases in which the rational basis test has been applied to retroactive statutes, the statutes at issue dealt directly with private causes of action, generally in some way setting limits on the damages which may be awarded. As a result, in those cases the statutes impinged an individual right (the right to receive damages which were available at the time of the injury) to advance a public interest (reducing liability insurance rates). Here, the application of the rational basis test to the present facts is not particularly easy to do. Assuming that a Court would determine that the potential legislation affected a substantive right, the potential legislation would be expanding an individual "right" (allowing a more beneficial method of calculating value to be used) and arguably having little effect on the public interest.¹ Therefore, the rational basis test would not work very well in this case. Based on this, it would be likely that the Court, if it were to begin considering the rational basis test, would look at this problem and determine that it supported the argument that the potential legislation was procedural in nature. It could also be argued that the rational basis test is satisfied because no private interests are overturned and the public interest in providing just compensation to private property owners outweighs these non-existent "overturned" private interests. In either event, it would appear that the government would have a difficult time proving that the potential legislation did not satisfy the rational basis test and therefore should be held to be unconstitutional as applied retroactively.

¹One could make an argument that the potential legislation either impinges the public interest (by forcing taxpayers to pay more for the property) or advances it (by forcing the government to pay the proper value for private property which is taken).

Based on the foregoing, it appears that there would be a strong argument that the potential legislation should be considered procedural in nature and therefore may be applied retroactively without running afoul of the constitution.

Mancheski v. State 49 W2d 46, 49 (1970)
Rosen v. Milwaukee 72 W2d 653, 662-3 (1975)

→ Sun Line RRC v. DOR 89 W2d 331, 349-54 (1980)
97 W2d 56 (1980)

→ Leathersmith Wiggins v. State
94 W2d 406 (1980)

→ Mancheski v. State 49 W2d 46 (1970)
Rademann v. DOT { 2002 WI App 59
252 W2d 191

→ income evidence is never admissible when
there is evidence of comparable sales (413)

~~see OR: 3209 (1m) (b)~~

3/30/05

called Anne Emerson & asked how far
back need to go to cover this particular
case. She'll get back to me.

4/1/05 re from Anne. Apply to:

pending lawsuit commenced beg 4/1/05
& not settled yet

2005

Date (time)
needed

5/2

LRB - 2592/1

BILL

PG: Wlj

(in
4/5)

Use the appropriate components and routines developed for bills.

AN ACT . . . [generate catalog] *to repeal . . . ; to renumber . . . ; to consolidate and renumber . . . ; to renumber and amend . . . ; to consolidate, renumber and amend . . . ; to amend . . . ; to repeal and recreate . . . ; and to create . . .* of the statutes; relating to: *determining fair market value . . . of property taken by condemnation . . .*

[NOTE: See section 4.02 (2) (br), Drafting Manual, for specific order of standard phrases.]

Analysis by the Legislative Reference Bureau

If titles are needed in the analysis, in the component bar:

For the main heading, execute: create → anal: → title: → head

For the subheading, execute: create → anal: → title: → sub

For the sub-subheading, execute: create → anal: → title: → sub-sub

For the analysis text, in the component bar:

For the text paragraph, execute: create → anal: → text

(attached)✓

The people of the state of Wisconsin, represented in senate and assembly, do enact as follows:

SECTION #.

Section #. 32.09 (1m) of the statutes is renumbered 32.09(1m)(a) and amended to read:

32.09 (1m) (a) As a basis for determining value, a commission in condemnation or a court may consider the price and other terms and circumstances of any good faith sale or contract to sell and purchase comparable property. A sale or contract is comparable within the meaning of this subsection if it was made within a reasonable time before or after the date of evaluation and the property is sufficiently similar in the relevant market, with respect to situation, usability, improvements and other characteristics, to warrant a reasonable belief that it is comparable to the property being valued.

History: 1975 c. 68, 191, 410, 425; 1977 c. 438, 440; 1983 a. 236; 1993 a. 490; 1997 a. 204.

SP + CS + B

SEC. CR; 32009 (1m) (b)

¶ 32009 (1m) (b) As a basis for determining value, a commission in condemnation or a court may consider an appraisal based on the income approach even if there is evidence of the sale of comparable property.

2005

Nonstat File Sequence: **EEE**

LRB _____/____

_____ : _____ : _____

INITIAL APPLICABILITY

1. In the component bar:
For the action phrase, execute: create → action: → *NS: → inappl
For the budget action phrase, execute: create → action: → *NS: → 93XX
For the text, execute: create → text: → *NS: → inappl
2. Nonstatutory subunits are numbered automatically. Fill in the Section # or subsection # only if a "frozen" number is needed. Below, for the budget, fill in the 9300 department code.

SECTION # ____ [93 ____] . Initial applicability;

(#1) ()

The treatment of sections ..

of the statutes

first applies to

1. In the component bar:
For the action phrase, execute: create → action: → *NS: → inappl
For the text, execute: create → text: → *NS: → inappl
2. Nonstatutory subunits are numbered automatically. Fill in the Section # or subsection # only if a "frozen" number is needed.

SECTION # Am . Initial applicability; no

(#1) Am This act first
applies to actions for the determination of fair market
value commenced on or after January 1, 2005 that
are pending on the effective date of this subsection.

[rev: 9/8/04 2005inappl(fm)]

(End)

Analysis

¶ Under current law, a property owner whose property is taken ^{for} a public purpose is entitled to the fair market ^{value} of the property taken. In determining fair market value, evidence of the income of a business is not admissible if there is evidence of the sale of comparable property. See ^① Leatham Smith Lodge, Inc. v. State ^{plain}, 94 Wis.2d 406 (1980) ①

¶ This bill provides that ^{an} appraisal of property based on the income approach may be considered even if there is evidence of the sale of comparable property.

FE-SL[✓]

Barman, Mike

From: Emerson, Anne
Sent: Friday, September 09, 2005 9:40 AM
To: LRB.Legal
Subject: FW: Draft review: LRB 05-2592/1 Topic: Use of income in determining fair market value

It has been requested by <Emerson, Anne> that the following draft be jacketed for the ASSEMBLY:

FW: Draft review: LRB 05-2592/1 Topic: Use of income in determining fair market value